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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1908~~ 131

HARRY SAGANSKY and
MORRIS WEINSTEIN,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the First Circuit entered in the above-entitled cases on March 25, 1966.

The petitioners file herewith a single petition in accordance with Rule 23 (5), their appeals in the lower court having been heard on a printed Consolidated Record Appendix, hereinafter designated "R".

Opinion Below

There was no opinion in the United States District Court for the District of Massachusetts.

The opinion of the Court of Appeals for the First Circuit is not yet reported, but is annexed hereto as Appendix A.

Judgments Below

The judgments of the United States District Court for the District of Massachusetts were entered on July 14, 1965 (R. 4-5) and are printed at R. 246-248.

The judgments of the Court of Appeals for the First Circuit were entered on March 25, 1966, and are annexed hereto as Appendix B.

Jurisdiction

The judgments sought to be reviewed are dated, and were entered, March 25, 1966.

A consolidated petition for rehearing was denied by order dated and entered April 14, 1966.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254 (1) and Rule 22 (2).

Questions Presented

1. Is an entrapment established as matter of law where a government undercover agent induces the unknowing commission of a *malum prohibitum* and the Government's rebuttal demonstrates only a passive, unconscious willingness on defendant's part to commit the proscribed act?

2. In a prosecution under 18 U.S.C. 1084 for using telephone facilities for the transmission of wagers in interstate commerce, is the defendant entitled to a judgment of acquittal where a government undercover agent performed the act of transmitting an interstate wager to the defendant?

3. In a prosecution under 18 U.S.C. 1084 for using telephone facilities for the transmission of wagers in interstate commerce, is the defendant entitled to a judgment of acquittal where the Government fails to prove the interstate transmission of more than a single wager under any count?

Statutes Involved

18 U.S.C.A.

§1081. Definitions.

As used in this chapter:

* * *

The term "wire communication facility" means any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission.

18 U.S.C.A.

§1084. Transmission of wagering information; penalties

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entities the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be

fined not more than $10,000 or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.

(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored.

Statement of the Case

This is a petition seeking review of judgments of the Court of Appeals remanding the cases for new trial after vacating the judgments of conviction of the District Court and setting aside jury verdicts of guilty originally entered July 14, 1965. The first four counts of the five-count indictment, returned March 4, 1964, charged petitioners jointly with knowingly using wire communication facilities for the transmission of a wager in interstate commerce, on February 10, 12, 19, and 21, respectively, of 1964, in violation of 18 U.S.C.A. §1084. The fifth count charged petitioner Sagansky alone with the commission of a similar offense on January 23, 1964. (R. 5-7).

The petitioners pleaded not guilty on March 4, 1964. (R. 1).

The evidence adduced at the trial may be summarized as follows:

John W. Hanley, a Special Agent in the Intelligence Division of the Treasury Department, testified that, on January 22, 1964, he went to the Brookline apartment of the defendant Sagansky and received $440, which were winnings on a wager he had previously placed on January 16 while in Sagansky's apartment. Sagansky stated that he was going to Florida on the 27th of the month and that Hanley could visit him at the Fontainebleau. At that point, Hanley placed $500 on Sagansky's desk, saying, "500 to win on Miami Mood." Sagansky picked the money up and told Hanley to be sure to use the two telephone numbers he had previously given Hanley. He also stated that he had talked to Moe and Bernie, who would handle Hanley's action while Sagansky was out of town. The two telephone numbers were At 9-0702 and At 4-5465, which Sagansky had written on a slip of paper, in his apartment on December 30, 1963, with directions written thereon to "ask for

Bernie." (Ex. 2, R. 239). On the same occasion, Sagansky had also written his own number on a slip of paper and given it to Hanley. (Ex. 3, R. 239). As Hanley was leaving, he stated that he was going to be in Washington, D.C. the following day and that he would call and give Sagansky some action, to which Sagansky replied, "Sure, that's okay." (R. 30-36).

On the following day, January 23, 1964, Hanley placed a telephone call from Washington to Sagansky at his Brookline apartment. After identifying himself as "Gerry," the name by which he was known to Sagansky, he stated that he had had "a little luck yesterday," referring to the fact that Miami Mood had won. Hanley then stated, "I have another one for you today. Golden Grain, $500 to win." Sagansky replied, "Okay, that's $500 to win on Golden Grain; right?" Hanley said, "Right." (R. 36-38).

On the next day, January 24, 1964, Hanley returned to Boston and went to Sagansky's apartment. After giving Hanley his $6200 in winnings on Miami Mood, Sagansky again told him to use the telephone numbers given him and told him that Moe and Bernie had been spoken to and they would handle his action in Sagansky's absence. He then asked where Hanley had called from on the day before. Hanley said, "My office in Washington." Sagansky said, "That's what I thought. Look, that could be dangerous. I have to be careful. The people who wanted to could find my number on your bill. You don't mind, do you?" Hanley said, "No." Sagansky said, "From now on when you call, use a 'phone booth, a pay 'phone." Hanley then assured him that, when he called from Washington in the future, he would use a public telephone. At some time during the conversation, Sagansky again said that he was going to Miami on the 27th and that Hanley could look him up at the Fontainebleau under the name Sage. (R. 38-41).

On January 30, 1964, after getting no answer at the two telephone numbers previously given him by Sagansky, Hanley called 284-6179 (Mrs. Claire Weinstein). When the connection with made, Hanley said, "Hello, Moe?" Weinstein said, "Yes." Hanley said, "This is Gerry." Weinstein said, "Gerry who?" Hanley said, "Doc [1] was supposed to have contacted you about me." Weinstein said, "Oh, Gerry. Hello. How are you?" Hanley said, "Fine," and then inquired about placing a bet on a hockey game. Weinstein said, "I'm sorry, Gerry, we don't handle hockey, never have." When Hanley inquired about basketball, Weinstein said, "Yes, sure, we handle basketball." Hanley then apologized for troubling Weinstein, who said, "That is no trouble. Any time at all, Gerry." (R. 41-45, 53-54).

Between February 4 and 8, 1964, Hanley placed four wagers with Weinstein, three by local telephone calls and one in a face-to-face transaction. (R. 54-61).

On February 10, 1964, Hanley placed a person-to-person long distance call from Washington to Weinstein at the Frolics. He informed Weinstein that he was calling from a pay station because of Doc's advice to do so when calling from "out of town," to which Weinstein responded that it was a "good idea." Then Hanley recited a wager, which was acknowledged by Weinstein. (R. 63-64).

On February 12, 1964, Hanley again placed a person-to-person call from Washington to Weinstein at the Frolics and recited a horse wager, which was repeated by Weinstein and confirmed by Hanley. (R. 64-65).

On February 18, 1964, while in Washington, Hanley called 284-9506 (the Frolics) three times, 289-0702 (Bernie) twice, 284-5465 (Bernie) twice, and 277-1720 (Sagansky) once. The three calls to the Frolics were placed person-to-person. On each occasion, Hanley could hear Weinstein

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[1] "Doc" is a reference to Sagansky. (R. 71).

telling the operator that Moe Weinstein was not there but would return in 15 or 20 minutes. On the call to the Sagansky residence, Hanley was told by a male voice that Sagansky was not expected until that night or the next day. On the other calls, there was no connection whatsoever. (R. 67-68).

On February 19, 1964, Hanley placed a station-to-station call from Washington to Weinstein at 284-9506 (the Frolics). Hanley said, "I tried to get you yesterday." Weinstein said, "Yeah, I know. Look, you shouldn't call person-to-person. Where are you calling from now, a 'phone booth?" Hanley said, "Yes." Weinstein said, "You know, it's dangerous. I have to be careful." Hanley said, "Oh, I'm sorry about that, Moe." Weinstein said, "That's all right, you didn't know." Hanley then recited a horse wager, which was repeated by Weinstein and confirmed by Hanley. (R. 68-70).

On February 21, 1964, Hanley placed a station-to-station call from Washington to Sagansky. When Hanley recited a horse wager, Sagansky told him to "call the other fellow," that is, "Moe." Sagansky then inquired where Hanley was, to which Hanley replied, "Home here in Washington." Sagansky then asked when Hanley was coming up and stated that he wanted to talk to him. (R. 70-72).

About a half an hour later, on the same date, February 21, 1964, Hanley placed a station-to-station call from Washington to Weinstein at 284-9506 (the Frolics). Hanley said, "I just spoke to Doc. He told me to call you." Weinstein said "Yeah, I know." Then Hanley recited a horse wager, which was acknowledged by Weinstein. (R. 72).

On February 25, 1964, Hanley visited Sagansky at the latter's Brookline apartment. At that point, Hanley owed $1300 as a result of transactions with Weinstein and Bernie, which amount he paid to Sagansky. As he was leaving,

Hanley said, "Well, I can't call you from out of town any more." Sagansky said, "Look, when you are in town, either call me or come up here. When you are out of town, call the other fellow" or "number." Hanley said, "I don't have Bernie's numbers. They have been changed." Sagansky said, "No, I mean the other fellow." (R. 73, 87-88).

Cross-examination of Hanley by counsel for Sagansky established that, prior to the long-distance telephone call of January 23, there were one, possibly two, local telephone calls to Sagansky concerning bets (R. 92) and two face-to-face transactions (R. 93). On January 22, Hanley's trip to Washington had already been planned. On that date, while in Sagansky's apartment, Hanley decided, on the spur of the moment, to make the long-distance call of the next day. (R. 93, 109-110). The decision to call and the statement to Sagansky of the intent to call were simultaneous. (R. 110). Prior to the statement by Hanley, there had never been any discussion about out-of-state calls. (R. 110). At no time did Sagansky suggest the making of an out-of-state call; the idea was brought up in conversation by Hanley. (R. 107-108). At no time during any one long-distance call to either Sagansky or Weinstein did Hanley make more than a single bet. (R. 108). The telephone numbers indicated on Exhibit 2 (R. 239) are those of Bernie Robbins, who is a bookie with a stamp. (R. 114). At no time did Sagansky give Weinstein's telephone number to Hanley. (R. 115).

Cross-examination of Hanley by counsel for Weinstein established that Hanley spoke to Weinstein for the first time on January 30. He obtained Weinstein's number from the telephone book. Hanley's statement to Weinstein on January 30 to the effect that Doc was supposed to have contacted Weinstein about Hanley was a deception. (R. 127). Hanley asked Cecil Rhodes to introduce him to Weinstein. (R. 127-128). On February 10, 1964, the date mentioned in

Count 1 of the indictment, Hanley called Weinstein. There was no prearrangement with Weinstein to call him long-distance. The original decision to call was Hanley's and was made either in the Washington office or during the flight to Washington. (R. 128-129). The call of January 23 to Sagansky was later approved by three of Hanley's supervisors. After this approval, it seemed like a good idea to make the call of February 10 to Weinstein. It was a good idea partially because Hanley had in mind a prosecution against Weinstein for transmitting a bet in interstate commerce. (R. 129-130). The call of February 12 to Weinstein, which is the subject of Count 2 of the indictment, was initiated by Hanley and was the joint idea of Hanley and his superior. There was no prior arrangement with Weinstein to make the call of February 12. (R. 130-131). The call of February 19 to Weinstein, which is the subject of Count 3, was also initiated by Hanley. It was the result of Hanley's personal decision, made on the day before in Washington. Weinstein did not ask that the call be made. (R. 131-132). The Count 4 call of February 21 to Weinstein was initiated by Hanley. The idea for the call was conceived by Hanley and his supervisors, primarily Hanley, without prior agreement with Weinstein. (R. 132-133).

There was no evidence that either defendant knew of the enactment of 18 U.S.C. 1084.

Reasons for Granting the Writ

I. A Question Is Presented Which Is of Broad Importance to the Administration of Federal Criminal Justice and Is Related to a Question Now Pending before This Court.

On January 31, 1966, this Court granted certiorari in *Osborn* v. *United States,* No. 724. One of the questions presented by that case is whether the defendant was en-

trapped as matter of law. The same question is presented here, but in the context of a *malum prohibitum*.

Evidence that the defendant "readily accepted" a government offer to commit a *malum prohibitum* is, according to the lower court, *prima facie* proof of a pre-existing "criminal state of mind", even in the absence of evidence that the defendant knew of the existence of the prohibitory statute or that there was probable cause to believe that the defendant was "predisposed" to commit the proscribed act. The lower court has, in effect, held that a mere prompt acquiescence in an apparently innocent act warrants the conclusion that a defendant had been consciously awaiting an opportunity to commit an offense which he did not know to be such and that a government agent had activated a pre-existing "criminal state of mind" in a man who never knew that his acts amounted to a crime.[1]

It was stated at 73 Harv. L. Rev. 1333, 1338 (1960):

> "At the opposite end of the causality spectrum is government conduct which is highly responsible for commission of the offense and reduces culpability to such an extent that a defense will always be afforded. One example is conduct by government officials which does not induce someone into conscious criminal activity, but lures him into an unknowing offense by deceiving him concerning a material matter of fact or law."

Voves v. *United States*, 249 Fed. 191 (7th Cir. 1918) and *United States* v. *Healy*, 202 Fed. 349 (D. Mont. 1913) are cited as authority for the foregoing proposition. They are the classic "pale-faced Indian" cases, involving alleged

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[1] For the proposition that ready compliance, standing alone, is not enough, even in the context of a *malum in se*, see the dissenting opinion of Frank, J., in *United States* v. *Masciale*, 236 F.2d 601, 605 (2d Cir. 1956), *aff'd*, 356 U.S. 386 (1958).

violations of statutes making it a crime *malum prohibitum* to sell liquor to Indians. In the *Healy* case, government agents sent an Indian whose natural appearance was not that of an Indian to make a purchase of liquor from the defendant. The court held that decoys may not be used to cause an "unconscious offending," *id.* at 350, even though the statute made the act a crime regardless of knowledge. In *Voves*, the decoy was an Indian who looked like a Mexican. The conviction was set aside with citation of the *Healy* case. Both cases were thereafter cited with approval in *Sorrells* v. *United States*, 287 U.S. 435, 442, 53 S. Ct. 210, 213 (1932), as being examples of situations where,

> "as a result of inducement, the accused is placed in the attitude of having committed a crime which he did not intend to commit . . ."

So in the instant case, petitioners have been induced to commit a *malum prohibitum* in complete ignorance of the governing statute. They have been lured into an "unconscious offending," *United States* v. *Healy, supra* at 350, by a deception "concerning a material matter of . . . . law." 73 Harv. L. Rev., *supra* at 1338. Elementary fairness requires that their convictions be reversed. Left to their own destinies, it is very likely that neither petitioner would ever in his lifetime have occasion to engage in an interstate wagering transaction. On the other hand, the wheel of chance might well, on one luckless turn, have stopped at such a pass. The question presented to this Court is whether the wheel should be allowed to turn *free of government tampering.*

As far as we can discover, the Court's last opportunity to cast light on the general subject of entrapment was presented in *Lopez* v. *United States*, 373 U.S. 427, 83 S. Ct.

1381 (1963), but was substantially reduced by the circumstance that the evidence barely raised the issue at all. With the possible exception of *Raley* v. *Ohio*, 360 U.S. 423, 79 S. Ct. 1257 (1959),[2] the only other opinions of this Court on the subject matter are found in *Masciale* v. *United States*, 356 U.S. 386, 78 S. Ct. 827 (1958), *Sherman* v. *United States*, 356 U.S. 369, 78 S. Ct. 819 (1958), and in the leading case of *Sorrells* v. *United States*, 287 U.S. 435, 53 S. Ct. 210 (1932), all of which treat the problem only in the most general terms and are largely concerned with the primary issue of inducement.

On the other hand, the instant case presents, in its simplest and purest form, the equally important, but more difficult, problem of the definition and application of the principles governing the so-called rebuttal issue of "predisposition". Is it enough that the defendant suffers from some dormant defect of character of which he may himself be unaware until brought to life by government inspiration? Or, more accurately, with respect to the facts of the instant case, can the passive willingness[3] to commit an offense be considered a moral defect at all? Finally, and even more narrowly, does it make a difference that the defendant unknowingly committed a *malum prohibitum*? It is submitted that in the answer to these questions lies the core of the law of entrapment.

II. The Decision of the Lower Court Is in Conflict with That of Another, Three-Judge Court and Involves Important Questions of Statutory Construction.

The lower court held that a person who *receives* a wager over a wire communication facility *uses* that facility for the

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[2] Misleading of defendants on a question of law, namely, the availability of privilege against self-incrimination, held, "the most indefensible sort of entrapment." 360 U.S. at 438, 79 S. Ct. at 1266.

[3] Defined here as a subconscious predilection unaccompanied by overt preparation for the commission of the offense charged.

transmission of wagers, within the meaning of 18 U.S.C. 1084 (a). This holding was supported in precedent only by a "confer" citation to *United States* v. *Fassoulis*, 185 F. Supp. 138, 139 (S.D.N.Y. 1960), *aff'd*, 293 F.2d 243, *cert. den.*, 368 U.S. 919 (1961), decided by a single district judge on an issue of venue.

There was no citation at all to a case in which a three-judge court, on precisely the same issue as here presented, arrived at a contrary result. In *Telephone News System, Inc.* v. *Illinois Bell Telephone Co. and United States*, 220 F. Supp. 621 (N.D. Ill. 1963), the court said, at page 638:

> "We must reject the theory that 'transmission' as used in subsection (a) means sending or receiving. Whatever validity there might be to the argument that 'transmission,' in some contexts, has a meaning broader than the term 'sending,' it is plain that Congress meant it as 'sending' in this statute. Subsection (d) uses the term 'transmitting or receiving,' and it is illogical to suppose that Congress would not have used both terms in both subsections had it meant to include 'receiving' in subsection (a). We shall not assume that 'transmission' has one meaning in subsection (a) and another in subsection (d), nor that 'receiving' in subsection (d) is superfluous."

On direct appeal to this Court, the decision was affirmed *per curiam*, 376 U.S. 782, 84 S. Ct. 1134 (1964).

The *Telephone* case was briefed and argued before the lower court and re-called to its attention in a petition for rehearing. Apparently, the conflict is recognized and intended by the First Circuit.

We submit that resolution of this issue is needed to forestall the uncertainty that will surely beset the courts as agents all over the country begin to take full advantage

of this new opportunity to elevate the suspected offense from a misdemeanor to a felony. The temptation to "make" their cases from the comfort of a government office situated beyond the state line will surely be too much to resist.

Finally, this case raises the issue whether the statute proscribes the use of a wire communication facility for a single wager, as held below, or whether it is directed only to a "continuing course of conduct", *United States* v. *Cohen*, 35 F.R.D. 227, 231 (N.D. Cal. 1964). We submit that intervention by the Court at this time is needed to put quickly to rest a problem which is certain to recur with increasing frequency as prosecutions under the statute multiply.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

United States Court of Appeals
For the First Circuit

No. 6608.

HARRY SAGANSKY,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE;

No. 6609.

MORRIS WEINSTEIN,
DEFENDANT, APPELLANT,
v.
SAME.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.

Walter J. Hurley, with whom *Thomas E. Dwyer* was on brief, for appellant in No. 6608.
Francis J. DiMento, with whom *DiMento & Sullivan* was on brief, for appellant in No. 6609.
William J. Koen, Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT.
March 25, 1966.

MCENTEE, *Circuit Judge*. These appeals are from judgments of conviction entered on jury verdicts finding the

defendants Sagansky and Weinstein guilty of knowingly using wire communication facilities for the transmission of wagers in interstate commerce in violation of 18 U.S.C. § 1084(a).[1] The indictment is in five counts. The first four charge the defendants jointly with the commission of this offense on four separate occasions in February 1964.[2] The fifth count charges Sagansky alone with violation of this statute on January 23, 1964.

There appears to be no dispute as to the material facts. There is substantial evidence that the defendants were engaged in the business of betting and wagering. On December 30, 1963, John Hanley, a special agent in the Intelligence Division of the Treasury Department, was introduced to Sagansky by one Cecil Rhodes, Jr. who had been placing bets with Sagansky. He introduced Hanley as Gerry Connelly, a business man from Washington, D. C. On that date after Hanley indicated he was interested in placing bets, Sagansky gave him his telephone number, and also gave him two other numbers to call when Sagansky was not available. On January 22, 1964, Hanley went to Sagansky's apartment in Brookline, Massachusetts, to collect on a recent bet he had made with him. While there Hanley placed another wager with Sagansky who informed him he would be leaving for Florida in a few days and told Hanley to be sure to use the two telephone numbers he had previously given him. He also stated he had talked

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[1] § 1084. Transmission of wagering information; penalties

"(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both."

[2] February 10, 12, 19 and 21, 1964.

to "Moe" and "Bernie" and they would handle his "action" while he (Sagansky) was out of town. As Hanley was leaving the apartment he told Sagansky he would be in Washington the next day and would call and give Sagansky some action. To this Sagansky replied "Sure, that's okay." On the next day, January 23, Hanley made a call from Washington to Sagansky in Brookline and placed a bet which Sagansky readily accepted.[3] Hanley returned to Boston the following day and went to Sagansky's apartment to collect on a previous bet. After paying Hanley $6200 Sagansky again told him that "Moe" and "Bernie" had been spoken to and they would handle his action in Sagansky's absence. During this conversation he asked Hanley where he had called from the day before. When Hanley told him he had called from his office in Washington, Sagansky said "That's what I thought . . . ." and requested Hanley to be more careful and to use a public telephone in the future.

On January 30 while Sagansky was in Florida, Hanley called the defendant, Morris Weinstein, also known as "Moe." He identified himself as "Gerry" explaining that "Doc [Sagansky] was supposed to have contacted you about me." Weinstein replied "Oh Gerry, Hello. How are you?" In this conversation Weinstein assured Hanley he would handle his action. During the next week Hanley made a number of local telephone calls to Weinstein placing bets and met with him on one occasion to make payment for his losses.

On February 10 while in Washington, Hanley made a long distance call to Weinstein from a pay station and

[3] The substance of this telephone conversation was as follows. Hanley stated, "I have another one for you today. Golden Grain, $500 to win." Sagansky replied, "Okay, that's $500 to win on Golden Grain, right?" Hanley said, "Right." Sagansky then asked Hanley when he would be returning to Boston so he could have the money ready for him which he (Hanley) had won on a previous bet.

placed a bet which Weinstein readily accepted.[4] On February 12 Hanley again called Weinstein from the same public phone booth in Washington and placed a horse wager which Weinstein repeated and Hanley confirmed. During this conversation Weinstein also acknowledged receipt of a check to pay for his losses which Hanley had mailed him from Washington. On February 18 Hanley called Weinstein person-to-person from Washington and overheard him tell the operator that Weinstein was not there. On the next day Hanley placed another call to Weinstein from Washington, this time station-to-station. After acknowledging that Hanley had called him the day before, Weinstein requested Hanley not to call him person-to-person, stating that he [Weinstein] had to be more careful. Hanley then placed a bet on a horse which Weinstein erroneously repeated and Hanley corrected.

On February 21 while still in Washington Hanley called Sagansky at his Brookline apartment and when he attempted to place a wager, Sagansky told him "to call the other fellow" (meaning "Moe"). Hanley informed Sagansky he was calling from Washington. Within a half hour Hanley called Weinstein as Sagansky had suggested. When he told Weinstein he had just talked to "Doc," Weinstein replied "Yeah, I know." Hanley then placed a bet which Weinstein readily accepted. On February 25 Hanley settled his account with Sagansky at his Brookline apartment.

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[4] There was no direct testimony that Weinstein definitely knew that Hanley was calling from Washington, but there was sufficient evidence from which the jury could find that Weinstein knew that it was a long distance call from another state. According to Hanley's testimony, when Weinstein answered, the operator asked Hanley to deposit $1.85. After depositing quarters, dimes and nickels, Hanley commented that it sounded like the 4th of July. Weinstein replied, "Yes, it does." Hanley also told Weinstein he was calling from a pay station because Doc (Sagansky) had told him to do so when calling from out of town.

Before the trial began each defendant moved to dismiss the indictment on the ground that the grand jury had been improperly selected. It appears from the stipulation filed in connection with these motions that the jury commissioners drew the prospective jurors from voting lists. The defendants contend that this method of selection is unlawful because it automatically excludes citizens who are not registered to vote. It also appears that no jurors were drawn from that part of the District of Massachusetts west of Worcester County which defendants claim is discriminatory. We have already decided that these grounds are insufficient to warrant dismissal of an indictment. *Katz* v. *United States,* 321 F.2d 7, 8 (1st Cir. 1963), cert. denied, 375 U.S. 903; *Gorin* v. *United States,* 313 F.2d 641, 644 (1st Cir. 1963), cert. denied, 374 U.S. 829; see also *King* v. *United States,* 346 F.2d 123 (1st Cir. 1965).

Defendants also filed pretrial motions for severance on the ground that each of them is prejudiced by the joinder of the other for trial together. They allege that it may be an integral part of the defense proffered by one defendant to call his co-defendant as a witness in his behalf and that said witness is not or may not be available to the other defendant unless each defendant is tried separately. They also argue that the offenses are not so simple in character that the acts charged against each defendant could be readily segregated and fairly understood by the jury. Clearly, joinder of the defendants in this indictment was proper under Rule 8(b) of the Federal Rules of Criminal Procedure, 18 U.S.C. Defendants attempt to bring this case within the purview of Criminal Rule 14 entitled "Relief from Prejudicial Joinder." As we said in *Gorin* v. *United States, supra,* to obtain severance defendants must make a strong showing of prejudice in order to invoke the discretionary remedies provided in this rule. It is well settled that the granting of severance lies in the discretion

of the trial judge. *Stilson* v. *United States,* 250 U.S. 583, 585 (1919). The denial of motions for severance on the same grounds as urged here were found by this court not to constitute an abuse of discretion. *Gorin* v. *United States, supra,* at 645-646.

We now come to the questions raised by the defendants during the trial itself. The court admitted evidence against both defendants of a certain telephone conversation between Weinstein and Treasury Agent Hanley and shortly thereafter admitted evidence against both defendants of a certain telephone conversation between Hanley and Sagansky. This evidence was admitted over objection of the defendants who complain they were prejudiced by the trial court's refusal to limit the conversation between Hanley and each defendant to the case against that defendant. On several other occasions during the trial the court so limited the admissibility of similar conversations as requested by counsel. It should be noted, however, that at the time the court refused to so limit these two telephone conversations, there was already ample evidence in the record from which the jury could find that when they took place these defendants were engaged in the joint commission of an offense. The record also shows that just prior to the admission of this evidence the court instructed the jury on the subject of joint commission of offenses.

As we said in *Quercia* v. *United States,* 70 F.2d 997, 999 (1st Cir. 1934):

> ". . . where there is prior evidence of an agreement to commit, or the joint commission of an offense, the statement of one is evidence against all who are concerned in it, if made in furtherance of the common design. It is not necessary that the indictment be for conspiracy, if a joint enterprise is shown and they are indicted as co-defendants."

Therefore, we cannot say that the trial court committed prejudicial error in refusing to so limit the two conversations above mentioned as requested by the defendants. See also *Lee Dip* v. *United States*, 92 F.2d 802 (9th Cir. 1937).

One of the essential elements of proof of the crime charged is the use of a wire communication facility for the transmission of bets or wagers. Defendants contend that the evidence is insufficient to warrant a finding that they used a wire for transmission of a wager in violation of 18 U.S.C. § 1084(a).[5] The gist of this contention is that the offense is committed by the one who initially sends in the bet and not by the one who receives it; in other words, the meaning of "transmission" as used in this statute does not embrace the act of receiving. While this might be a proper construction of the term "transmission" taken out of context, § 1084(a) does not punish the mere transmission of bets or wagers, but rather the "use" of interstate wire communication facilities for their transmission. When a person holds himself out as being willing to make bets or wagers over interstate telephone facilities, and does in fact accept offers of bets or wagers over the telephone as part of his business, we think it is consistent with both the language and the purpose of the statute to hold that he has "used" the facility for the transmission of bets or wagers. *Cf. United States* v. *Fassoulis*, 185 F.Supp. 138, 139 (S.D.N.Y. 1960), affirmed, 293 F.2d 243, cert. denied, 368 U.S. 919 (1961).

Next, defendants point to the fact that the statute refers to "bets or wagers" in the plural, and assert that the transmission of one isolated bet is not enough. We agree that if this be true, the fact that there were five counts, each for a different occasion, would not help the govern-

[5] Defendants also contend that the court's charge on the definition of "transmission" was erroneous.

ment. Each count must speak for itself. *Walker* v. *United States,* 176 F.2d 796 (9th Cir. 1949). However, even though it is perhaps plausible on its face, we reject defendants' construction. It is evident that section 1084(a) is not designed to reach persons who bet or wager on only one, passing, occasion. To this end, a prerequisite to violation of the statute is that a defendant "be engaged in the business of betting or wagering."[6] The statute does not, in terms, create a further prerequisite that a defendant be in the interstate, as distinguished from intrastate, business. The only reasonable explanation for the defendants' proposed interpretation is that, by employing the plural number, Congress did just that. This would certainly be an awkward way to do it, and the legislative history[7] suggests no such purpose. Indeed, what little assistance we get from the legislative history only reenforces our belief that use of the plural number was the result, not of design, but of somewhat imprecise, conversational, language; and that Congress in fact wished to reach a single use of interstate facilities by one otherwise engaged in the business of betting.[8]

Furthermore, defendants' construction would lead to totally impractical results. Suppose a professional gambler

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[6] That defendants were in the business was adequately alleged in each count, and established.

[7] See: U.S. Code Cong. & Ad. News, Vol. 2, p. 2631 (87th Congress, First Session, 1961).

[8] "Subsection (a) of the new section prohibits those persons who are engaged in the business of betting or wagering from knowingly using *a wire communication* facility for the transmission of *bets or wagers* in interstate or foreign commerce on any sporting event or contest. It also prohibits the transmission of *a wire communication* which entitled the recipient to receive money or credit as a result of a *bet or wager* or for information assisting in the placing of *bets or wagers.*" House Report No. 967, 87th Cong., 1st Sess. (1961) (Ital. suppl.) Although subsection (a) uses the plural number each of the four times it refers to bets or wagers, the quoted portion of the Report employs the singular and plural indiscriminately.

used interstate wires on ten different days, but never to place more than one bet on a single day. Would he have never violated the statute? If he would have violated it, when, and how often, i.e., how many counts should there be in the indictment? Complicated questions of double jeopardy can be readily imagined. We cannot believe that Congress intended an interpretation which would produce such difficulties.

Within limits the intention of Congress may prevail over the literal language of the statute. *Idaho Sheet Metal Works, Inc.* v. *Wirtz,* U.S. , 2/24/66. We reject defendants' construction of the statute. In this particular case we believe that such a construction would make the statute so vague as to render it unconstitutional. If a defendant is professionally engaged in making bets and wagers, one single use of interstate facilities is an offense.

Another assignment of error urged here relates to the so-called "piecemeal" instructions given by the court at various intervals during the trial.[9] We have examined these instructions with care and we cannot say that any of them constituted prejudicial error. It appears to us that for the most part these instructions were necessary under the circumstances in order to clarify the issues and generally to assist the jury.

The defendants make objections to the charge to the jury, raising again the whole subject of entrapment, on which, of late, we have frequently commented. At the expense of repetition, but because there appears to be much misunderstanding, the defense of entrapment is afforded not because the defendant did not commit the offense, but

[9] On at least four occasions the court instructed the jury that questions put by counsel to a witness were not to be considered as evidence. The court also instructed the jury on the matter of joint commission of a crime and alerted the jury with reference to the defense of entrapment.

because it is not proper that he should be convicted for government-produced criminality. On the other hand, the mere fact that the opportunity to commit the offense was afforded to a man waiting for such an opportunity does not mean that the government was the effective cause of his criminal conduct. The question is, who generated it? Thus, in every case of entrapment there are two possible issues. (1) Did the government put in motion this particular offense; and (2) did it initiate the defendant's criminal state of mind, or only activate it? The first issue is called inducement; the second is considered in terms of defendant's predisposition.[10] In *Gorin* v. *United States, supra,* we held that the defendant has the burden of proving by a preponderance of the evidence that he was induced and if he meets this burden, the prosecution must then prove beyond a reasonable doubt that defendant was predisposed to commit the offense.

In the instant case most of the evidence came from the government. The defendants sought to elicit the fact of entrapment from the government witnesses. It is undisputed that the government agent, Hanley, was the one to suggest the use of the interstate wire for his proposed bets. The defendants accordingly requested the court to charge that inducement had been established as a matter of law. The court refused, and left the issue to the jury, placing the burden upon the defendants. This was error since the court thereby placed a burden on the defendants to prove something which the government had already proved for them. Agent Hanley's conduct here amounted to inducement as a matter of law.

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[10] A third question, to which we addressed ourselves, in *Whiting* v. *United States*, 321 F.2d 72 (1st Cir. 1963), cert. denied, 375 U.S. 884, and will not dwell upon further, is whether, even if a defendant may be criminally predisposed, the government must have known this before offering him the opportunity.

We might agree that where there is an open, unmistakable offer, as by a vendor displaying an article on his counter, the act of a government agent in making a purchase could not in any reasonable sense be regarded as inducing the crime. But here the fact that the defendants were, we will assume, self-advertised as engaged in accepting bets did not constitute an open offer to commit the much more serious offense of transmitting across state lines. As to this, the initiation clearly came from Hanley. It is true that defendants readily accepted. We unhesitatingly reject their contention that entrapment was shown as matter of law. However, we do not see how it could be said that Hanley did not induce the offense. See *Waker* v. *United States,* 344 F.2d 795, 796 (1st Cir. 1965); *Whiting* v. *United States, supra* note 8, at 75.

Since this case must be retried in any event, this is a suitable occasion to consider whether we should revise our rule as announced in *Gorin* v. *United States, supra.* We there affirmed the action of the district court in placing the burden of persuasion upon the defendant to establish inducement, but remanded for a new trial because the court had failed to charge the jury that the *quantum* of this burden was only a preponderance of the evidence. We know of no court that has ever placed a heavier burden on the defendant, and under no circumstances would we consider doing so. However, since our decision in *Gorin,* we have noticed and commented upon the confusion apt to be generated in a jury's mind by having to apply two measures of the burden of proof in the same case. See *Waker* v. *United States, supra* at 796, n.3. Upon further consideration, we think that this difficulty calls for resolution. The solution that we propose is to reduce the burden which we have previously placed on the defendant from a burden of persuasion to a mere burden of coming

forward with evidence.[11] *Johnson* v. *United States*, 317 F.2d 127, 129 n.2 (D.C. Cir. 1963); *United States* v. *Silva*, 180 F.Supp. 557, 558 (S.D.N.Y. 1959).[12] This we do, not because our view of the doctrine of entrapment has changed, but in order to simplify the problems of the jury and, possibly, of the charging judge.

Accordingly, if the evidence, whether elicited from the government or defense witnesses, would warrant a finding of inducement, the defendant is entitled to a charge that the government has the burden of proving beyond a reasonable doubt either that there was in fact no inducement, or that the defendant was predisposed, as we have previously defined predisposition. The evidence of inducement, or, conceivably, of the absence of predisposition, may be so strong that either or both questions must be resolved in the defendant's favor as matter of law. Conversely, of course, if the defendant fails to meet his burden of coming forward with evidence of inducement, there is no entrapment as a matter of law, and, thus, nothing on that matter to go to the jury. If, as in the present case, there was inducement as a matter of law, then only the question of predisposition is submitted to the jury and the government has the burden of proving it beyond a reasonable doubt.

Judgments will be entered vacating and setting aside the judgments of the district court and remanding the cases for a new trial.

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[11] For a discussion of the difference, see McCormick, Evidence §§ 306 and 307 (1954).

[12] We make no comment on whether we would agree with the courts' appraisals of the evidence in these cases.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6608.

HARRY SAGANSKY,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

JUDGMENT
March 25, 1966

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated, the verdict is set aside and the case is remanded to that Court for a new trial not inconsistent with the opinion filed today.

By the Court:
(s) ROGER A. STINCHFIELD
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6609.

MORRIS WEINSTEIN,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

JUDGMENT
March 25, 1966

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated, the verdict is set aside and the case is remanded to that Court for a new trial not inconsistent with the opinion filed today.

By the Court:
(s) ROGER A. STINCHFIELD
Clerk.